

US EPA ARCHIVE DOCUMENT

**BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY REGION III**
1650 Arch Street, Philadelphia, Pennsylvania 19103

_____	:	
In The Matter of:	:	Proceeding Under Section 309(a) of the
	:	Clean Water Act, 33 U.S.C. § 1319(a)
David E. and Jewel M. Yutzy	:	
15638 Spar Mine Road	:	Docket No. CWA-03-2010-0297DN
Timberville, Virginia 22853	:	
	:	
and	:	FINDINGS OF VIOLATION
	:	AND
Windcrest Associates, LLC	:	ORDER FOR COMPLIANCE
7346 Crossroads Lane	:	
Timberville, Virginia 22853	:	
	:	
Respondents	:	
_____	:	

I. PRELIMINARY STATEMENT

1. This Order for Compliance is issued under the authority vested with the Administrator of the United States Environmental Protection Agency (“EPA”) by Section 309(a) of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1319(a). The Administrator has delegated this authority to the Regional Administrator of EPA Region III who in turn has delegated it to the Director of the Water Protection Division (“Complainant”).

II. STATUTORY AND REGULATORY AUTHORITY

2. Section 301 of the CWA, 33 U.S.C. § 1311, prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342.
3. Section 402 of the CWA, 33 U.S.C. § 1342, provides for the issuance of National Pollutant Discharge Elimination System (“NPDES”) permits which allow the discharge of pollutants under specified conditions.
4. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the term “discharge of pollutant” to include “any addition of any pollutant to navigable waters from any point source.”
5. “Pollutant” is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6) to include “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”

6. "Point Source" is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14) to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, well, discrete fissure, container, rolling stock, concentrated animal feeding operation . . . from which pollutants are or may be discharged."
7. "Animal feeding operation" or "AFO" is defined by 40 C.F.R. § 122.23(b)(1) as a lot or facility where animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any twelve-month period, and where crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.
8. "Concentrated animal feeding operation" or "CAFO" is defined by 40 C.F.R. § 122.23(b)(2) as an animal feeding operation that is defined as a Large CAFO or Medium CAFO in accordance with 40 C.F.R. § 122.23(b), or that is designated as a CAFO in accordance with 40 C.F.R. § 122.23(c).
9. "Medium CAFO" is defined at 40 C.F.R. § 122.23(b)(6)(i)(A) as an AFO that stables or confines between 200 to 699 mature dairy cows whether milked or dry, and either A) discharges pollutants into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or B) discharges pollutants directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.
10. Pursuant to 40 C.F.R. § 122.23 (a) "[o]nce an animal feeding operation is defined as a CAFO for at least one type of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals, regardless of the type of animals."
11. "Waters of the United States" are defined by 40 C.F.R. § 122.2 to include interstate waters and tributaries thereto.
12. "Process wastewater" is defined in 40 C.F.R. § 122.23(b)(7) as water "directly or indirectly used in the operation of the AFO for any of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities, direct contact swimming, washing, or spray control of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding."
13. "Manure" is defined by 40 C.F.R. § 122.23(b)(5) to include "manure, bedding, compost, and raw materials or materials commingled with manure or set aside for disposal."
14. The Department of Environmental Quality (DEQ) is the agency within the Commonwealth of Virginia which is authorized to administer the federal NPDES Program. EPA maintains concurrent enforcement authority with authorized state NPDES programs to address violations of the CWA.

III. FACTUAL BACKGROUND

15. Mr. David E. Yutzy and Ms. Jewel M. Yutzy are the members of Windcrest Associates LLC (collectively referred to as “Respondents”). Windcrest Associates LLC owns two parcels of land located at 15638 Spar Mine Road, Timberville, VA 22853 and on CC Turner Trail, Timberville, VA 22853 (collectively referred to as the “Facility”). Respondents operate a dairy and a turkey grow-out operation at the Facility.
16. On April 15, 2010, EPA representatives conducted a CWA inspection at the Facility.
17. Based upon statements made by Mr. David E. Yutzy and Ms. Jewel M. Yutzy, Respondents stable or confine 200 to 250 mature dairy cows in the barn on the Facility for at least 45 days or more in any twelve-month period.
18. Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season in the barn where dairy cows are confined.
19. The Facility is located adjacent to the North Fork of the Shenandoah River, and an unnamed tributary to the North Fork of the Shenandoah River originates on the Facility from a spring located on the Facility.
20. During the inspection on April 15, 2010, the inspectors observed:
 - a. Mature dairy cows in the unnamed tributary to the North Fork of the Shenandoah River;
 - b. Cow manure next to the unnamed tributary to the North Fork of the Shenandoah River;
 - c. Cow footprints in the unnamed tributary to the North Fork of the Shenandoah River;
 - d. The Facility’s Nutrient Management Plan (“NMP”) expired on December 14, 2009;
 - e. The Facility’s Conservation Plan included 4,000 feet of fence to be installed by May 2009 on both sides of the unnamed tributary to the North Fork of the Shenandoah River and between the animal lots and the North Fork of the Shenandoah River. The Facility’s Conservation Plan states that “Exclusion fence will be installed as indicated on the plan map and built according to the specifications provided by NRCS [(i.e., Natural Resources Conservation Service)]. The fence will be a minimum of 35 feet away from the top of the stream bank. The fence will be a minimum of 7 strand high tensile fence, 4 strand of barb wire, or 4 foot woven wire with 1 strand of barb wire on top;”
 - f. No exclusion fence was present along the unnamed tributary to the North Fork of the Shenandoah River or between the animal lots and the North Fork of the Shenandoah River;
 - g. The Facility’s Conservation Plan included ten acres of Use Exclusion to be installed by May 2009 in the heifer lot along the North Fork of the Shenandoah River. The Facility’s Conservation Plan states that “[f]ence will be constructed to exclude livestock from areas needing protection to maintain or improve environmental factors, aesthetic value, or allow establishment of desired vegetation;”

h. No exclusion fence was present along the North Fork of the Shenandoah River.

21. Based on statements made by Mr. David E. Yutzy and Ms. Jewel M. Yutzy, Respondents are in the process of having a new NMP be developed for the Facility.

IV. CONCLUSIONS OF LAW AND FINDINGS OF VIOLATION

22. Mr. David E. Yutzy, Ms. Jewel M. Yutzy and Windcrest Associates LLC are each a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

23. The Facility includes a dairy barn that confines 200 to 250 dairy cows for a total of 45 days or more in any twelve-month period. No crops, vegetation, forage growth, or post harvest residues are sustained in the normal growing season over any portion of the barn where dairy cows are confined.

24. The Facility is an AFO as defined by 40 C.F.R. § 122.23(b)(1).

25. The North Fork of the Shenandoah River and its unnamed tributary are Waters of the United States, as defined by 40 C.F.R. § 122.2.

26. Respondents’ cows come into direct contact with both the North Fork of the Shenandoah River and the unnamed tributary to the North Fork of the Shenandoah River. Accordingly, the Facility discharges pollutants directly into Waters of the United States which comes into direct contact with the animals confined in the operation.

27. The Facility is a Medium CAFO as defined in 40 C.F.R. § 122.23(b)(4).

28. At the time of the inspection and the date of the issuance of this Order, Respondents did not have a CWA NPDES Permit for the Facility.

29. The discharge of pollutants from the Facility without an NPDES permit constitutes the unauthorized discharge of pollutants from a point source to waters of the United States. This is a violation of Section 301 of the CWA, 33 U.S.C. § 1311, and its implementing regulations.

V. ORDER FOR COMPLIANCE/INFORMATION REQUEST

30. Therefore, this _____ day of ____, 2010, Respondents are hereby ORDERED, pursuant to Section 309(a) of the CWA, 33 U.S.C. § 1319(a), to immediately cease and desist discharge of pollutants into waters of the United States unless such discharges are in accordance with an NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

31. Additionally, within thirty (30) days of the receipt of this Order, Respondents shall submit a compliance plan to EPA for review, comment, and acceptance, setting forth the actions Respondents have taken and commit to undertake and complete to assure compliance with the CWA, setting forth dates for the completion of each compliance action. This plan shall include, but is not be limited to, actions to prevent discharges of pollutants from livestock to Waters of the United States.

VI. NOTICE OF INTENT TO COMPLY

32. **Within ten (10) business days** of the effective date of this Order, Respondents shall submit to EPA a notice indicating whether Respondents will comply with the Order. The Notice and all other requests outlined above shall be submitted to:

Mr. Mark Zolandz
United States Environmental Protection Agency
NPDES Enforcement Branch (3WP42)
1650 Arch Street
Philadelphia, PA 19103-2029

VII. GENERAL PROVISIONS

33. Issuance of this Order shall not be deemed an election by EPA to forego any administrative, civil or criminal action to seek penalties, fines or any other appropriate relief under the Act for the violations cited herein. EPA reserves the right to seek any remedy available under the law that it deems appropriate for the violations cited. Failure to comply with this Order or the Act can result in a civil judicial action initiated by the U.S. Department of Justice. If EPA initiates such an action, Respondent will be subject to civil penalties of up to \$37,500 per day of violation pursuant to 40 C.F.R. Part 19.
34. If a criminal judicial action is initiated, and Respondents are convicted of a criminal offense under Section 309(c) of the Act, 33 U.S.C. § 1319(c), Respondents may be subject to a monetary fine and/or imprisonment and may become ineligible for certain contracts, grants or loans under Section 508 of the Act, 33 U.S.C. § 1368.
35. This Order does not constitute a waiver or modification of the terms or conditions of any NPDES permit. Compliance with the terms and conditions of this Order does not relieve the Respondents of their obligations to comply with any applicable federal, state, or local law or regulations.

VIII. EFFECTIVE DATE

36. The Order shall be effective upon receipt by Respondents.

Date: _____

_____/S/_____
Jon M. Capacasa, Director
Water Protection Division